BRB No. 09-0411 BLA

HAYES A. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/26/2010
	)	
EASTERN COAL CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Ann Marie Scarpino (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2006-BLA-05976) of Administrative Law Judge Kenneth A. Krantz awarding benefits with respect to a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] After crediting claimant with twenty-six years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge initially excluded Employer's Exhibits 2-4, consisting of two addendums and a deposition by Dr. Rosenberg, on the ground that these submissions were based on evidence that exceeded the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(i). The administrative law judge found that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further determined that claimant established that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge erred by not giving it the opportunity to cure its evidence before issuing his Decision and Order. Employer also asserts that the administrative law judge erred in relying on Dr. Mettu's opinion to find that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's evidentiary rulings and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief, asserting that the case should not be remanded because employer was given the opportunity to address whether it should be permitted to exceed the evidentiary limitations and, therefore, has not shown prejudicial error on the part of the administrative law judge.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] Claimant filed an initial claim for benefits on October 10, 2000, which was denied by Administrative Law Judge Thomas F. Phalen on May 6, 2002, on the ground that claimant failed to establish existence of pneumoconiosis. Director's Exhibit 1. No further action was taken by claimant with respect to the denial of his claim until he filed the current subsequent claim on October 25, 2005. Director's Exhibit 2.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. EVIDENTIARY LIMITATIONS

A. Procedural History and the Administrative Law Judge's Findings

At the hearing held on December 11, 2007, employer proffered the opinion of Dr. Rosenberg, which consisted of an initial written report dated March 2, 2007, an addendum report prepared on April 27, 2007, a second addendum report prepared on July 6, 2007, and the transcript of Dr. Rosenberg's deposition conducted on December 3, 2007.[4] Employer's Exhibits 1-4. Counsel for claimant objected to the admission of Dr. Rosenberg's addendum reports and his deposition testimony, stating that he was "troubled" by Dr. Rosenberg's reference to a series of x-rays, which the physician had reviewed in preparation of his opinion. Employer's Exhibits 2-4; Hearing Transcript at 12. Claimant argued that, if Dr. Rosenberg's personally reviewed the x-rays from Pikeville Medical Center, his readings would be in excess of the evidentiary limitations. In response to claimant's objection, employer's counsel asserted that, because Dr. Rosenberg has changed his opinion as to the existence of pneumoconiosis after reviewing

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States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] The record reveals that Dr. Rosenberg initially diagnosed pneumoconiosis based on an x-ray he read in conjunction with his examination on March 2, 2007. However, in preparing the addenda, Dr. Rosenberg reviewed: "Chest x-rays from Pikeville Medical Center dated June 26, 2000, December 18, 2000, May 2, 2003, June 5, 2004, April 11, 2005, June 8, 2006, [and] February 15, 2007." Employer's Exhibits 2, 3. Dr. Rosenberg testified in a deposition conducted on December 3, 2007, that he diagnosed pneumoconiosis in his initial report but changed his opinion after personally reviewing a series of x-rays from Pikeville Medical Center, and now believes that his diagnosis of pneumoconiosis was wrong. Employer's Exhibit 4.

the additional x-rays, the administrative law judge should find that good cause has been shown by employer for admitting excess x-ray readings that are relevant to the issue of whether claimant has pneumoconiosis. The administrative law judge deferred ruling on the admissibility of Dr. Rosenberg's opinion, and gave the parties the opportunity to file post-hearing briefs addressing this evidentiary issue and the merits of claimant's entitlement to benefits. *Id*. at 43.

Employer filed a post-hearing brief and stated that, "if the administrative law judge finds Dr. Rosenberg considered too many chest x-ray films then employer believes it has established good cause for exceeding the evidentiary limitations in this subsequent claim." Employer's Post-Hearing Brief at 13. Employer specifically noted that Dr. Rosenberg explained "the benefits of reviewing a series of [claimant's] x-rays to reach a considered opinion about the existence of pneumoconiosis." *Id*. Employer further asserted that because this is a subsequent claimant, "the prior evidence from the earlier claim is relevant to determine "the latency and progressivity of the disease." *Id*.

In his Decision and Order, the administrative law judge acknowledged that, under the regulations, "any evidence submitted in conjunction with any prior claim shall be made part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." Decision and Order at 7, quoting 20 C.F.R. §725.309(d)(1). Applying this rule, the administrative law judge determined that Dr. Rosenberg's addenda and deposition testimony were inadmissible and explained:

> Dr. Rosenberg may review the admissible interpretations of all the [x]-rays from the prior claim for his medical report. However, the allowance under 20 C.F.R. §725.309(d)(1) is not a means to circumvent the limitations by generating new interpretations of old [x]-rays. Thus, Dr. Rosenberg is limited to reviewing the previous interpretations of the [x]-rays and may not re-interpret the actual films as this would constitute new evidence and would only be admissible in the medical report if the new interpretations had been entered into the record as one of the two affirmative [x]-rays permitted under 20 C.F.R. 725.414(a)(3)(i). Since Dr. Rosenberg re-interpreted the [x]-rays by actually reviewing the films, and since [e]mployer may not enter the remaining six [x]-rays into their affirmative case, [Employer] has exceeded the evidentiary limitations.

Decision and Order at 6.[5]

[5] The administrative law judge noted that Dr. Rosenberg's reading of the February 15, 2007 x-ray, as mentioned in the addenda, had been proffered by employer as one of its two permitted affirmative x-rays in accordance with 20 C.F.R. §725.414(a)(3)(i) and,

The administrative law judge also found that employer failed to demonstrate good cause for exceeding the evidentiary limitations. The administrative law judge noted that, contrary to employer's assertion, good cause is not determined "by mere reference to the relevance of the evidence." Decision and Order at 7. Although Dr. Rosenberg considered the additional chest x-rays to be relevant to his medical opinion, the administrative law judge determined that Dr. Rosenberg had ample evidence available to him from the prior claim to support his opinion, without generating new x-ray interpretations, and that employer had "not shown any evidence suggesting why the former interpretations were insufficient for Dr. Rosenberg's evaluation." *Id*. Additionally, the administrative law judge determined that because Dr. Rosenberg's two addendums and his deposition testimony were based "almost completely on the inadmissible x-ray evidence . . . *they can not be redacted*" and that the evidence had to be excluded in its entirety. *Id*. at 8 (emphasis added). Thus, the administrative law judge admitted Dr. Rosenberg's report dated March 2, 2007, but ruled that the addendums and the deposition testimony, contained at Employer's Exhibits 2-4, were excluded from the record.

B. Arguments on Appeal

Citing *L.P.* [*Preston*] *v. Amherst Coal Co*., 24 BLR 1-55 (2008)(*en banc*), employer argues that the administrative law judge erred in rendering his evidentiary ruling before issuing his Decision and Order. In *Preston*, the Board held that:

> Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations . . . if the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

Id. at 1-63. Employer maintains that the administrative law judge's "procedural ruling and its timing unfairly deprived employer of its right to raise a full and proper defense"

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therefore, it was permissible for Dr. Rosenberg to reference that x-ray in rendering his medical report. Decision and Order at 6.

and that the ruling "violated employer's due process rights and the Administrative Procedure Act (APA)." Employer's Memorandum in Support of Petition for Review at 12; *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). As a result, employer asserts that the administrative law judge erroneously determined that claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability causation at 20 C.F.R. §718.204(c). Accordingly, employer requests that the case be remanded so that it has an opportunity to cure its evidence before the issuance of the Decision and Order.

Claimant and the Director assert that, because employer was given the opportunity to address the admissibility of Dr. Rosenberg's opinion at the hearing, and through the submission of a post-hearing brief, there has been no showing of prejudicial error by the fact that the administrative law judge did not make his evidentiary rulings prior to the issuance of his Decision and Order. They distinguish *Preston* from the instant case, noting that the Board was concerned in *Preston* that the opposing party be allowed to make a good cause argument for admission of the evidence before it was excluded by the administrative law judge. In this case, because employer was given the opportunity to present a good cause argument, they assert that the administrative law judge permissibly ruled on the admissibility of Dr. Rosenberg's opinion in his Decision and Order.

We agree that there has been no showing of prejudice to employer, based on the timing of the administrative law judge's evidentiary ruling. Although the administrative law judge waited until he issued his Decision and Order to notify the parties that portions of Dr. Rosenberg's opinion had been excluded, we decline to remand this case, as requested by employer, because the facts of this case satisfy the standard for fairness and administrative efficiency outlined in *Preston*. *Preston*, 24 BLR at 1-55. Specifically, employer received notice at the hearing that claimant challenged the admissibility of Dr. Rosenberg's addenda and his deposition testimony. Employer was also given the opportunity, both at the hearing and in its post-hearing brief, to make a good cause argument, which was specifically addressed by the administrative law judge. Hearing Transcript at 12-13, 18-20; Employer's Post-Hearing Brief. Because the administrative law judge gave proper consideration to employer's good cause argument, but ultimately found that it was without merit, we reject employer's assertion that it was denied a full and fair opportunity to present a defense in this case. Therefore, we reject employer's assertion of prejudicial error and affirm the administrative law judge's decision to exclude Employer's Exhibits 2-4 from the record.[6]

[6] Employer does not challenge the administrative law judge's finding that that Dr. Rosenberg's x-ray interpretations exceeded the evidentiary limitations, or his determination that employer failed to demonstrate good cause of admission of the two addendums and the deposition testimony. Therefore, we affirm the administrative law judge's findings on these issues. *See Skrack*, 6 BLR at 1-711.

II. MERITS OF ENTITLEMENT

A. The Administrative Law Judge's Findings

Employer challenges the administrative law judge's finding that claimant established the existence of legal pneumoconiosis and total disability due to pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge specifically considered claimant's treatment records, and the medical opinions of Drs. Wiot, Rosenberg and Mettu.[7] Decision and Order at 9-10. The administrative law judge found that claimant's treatment records show that he was "consistently diagnosed with chronic bronchitis, and chronic obstructive pulmonary disease." *Id*. at 25; *see* Director's Exhibit 11; Claimant's Exhibits 5, 7; Employer's Exhibit 7. The administrative law judge gave less weight to Dr. Wiot's opinion, that claimant did not have pneumoconiosis, in comparison to the opinions of Drs. Rosenberg and Mettu, because Dr. Wiot did not perform a physical examination of claimant and he did not consider claimant's medical history. The administrative law judge found that the opinions of Drs. Mettu and Rosenberg supported a finding that claimant had a chronic lung disease. *Id*. at 25-26; *see* Employer's Exhibit 1. Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the administrative law judge found that Dr. Mettu's opinion, that claimant's chronic bronchitis was due to smoking and coal dust exposure, was reasoned and documented and entitled to determinative weight. Therefore, the administrative law judge found that claimant satisfied his burden to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Regarding the issue of total disability causation at 20 C.F.R. §718.204(c), the administrative law judge found that Dr. Wiot's opinion was not probative because he did not offer an opinion as to the etiology of claimant's total disability. Decision and Order at 29. Although Dr. Rosenberg attributed claimant's respiratory disability in part to pneumoconiosis, the administrative law judge considered Dr. Rosenberg's opinion to be entitled to less weight because the doctor appeared to focus his opinion on whether clinical pneumoconiosis caused claimant's respiratory impairment, and not legal pneumoconiosis. *Id*. However, the administrative law judge determined that Dr. Mettu's opinion was "directly on point with legal pneumoconiosis, and therefore, [was] the most probative." Decision and Order at 29. The administrative law judge credited Dr. Mettu's opinion, that claimant's "coal mine dust exposure significantly aggravated and (or) contributed" to claimant's respiratory impairment, and found that claimant satisfied his

[7] We affirm the administrative law judge's credibility findings with regard to Dr. Wiot as they have not been challenged by employer on appeal. *See Skrack*, 6 BLR at 1-711.

burden to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See* Director's Exhibit 11.

B. Arguments on Appeal

Employer asserts that Dr. Mettu's opinion is not reasoned and documented to support a finding that claimant has legal pneumoconiosis. Employer contends that Dr. Mettu did not specifically identify the objective medical evidence that led him to conclude that claimant has chronic bronchitis due, in part, to coal dust exposure or that coal dust exposure contributed to claimant's pulmonary impairment. Director's Exhibit 11. Thus, it is employer's contention that the administrative law judge did not adequately explain his credibility finding with respect to Dr. Mettu's opinion at 20 C.F.R. §718.202(a)(4). We disagree.

The administrative law judge specifically noted that Dr. Mettu is Board-certified in Internal Medicine and Pulmonary Diseases and prepared a report based on his examination of claimant, including a review of claimant's work history, smoking history, a chest x-ray, pulmonary function study, blood gas study, and an EKG report. Decision and Order at 24. He found that that Dr. Mettu discussed claimant's medical history of chronic bronchitis and symptoms of wheezing and cough, chest pain and shortness of breath. *Id*. The administrative law judge further noted that "[a]s a result of his examination and tests," Dr. Mettu diagnosed chronic bronchitis due to smoking and coal dust exposure, and opined that claimant's coal dust exposure contributed to his severe respiratory impairment. *Id*. at 25. The administrative law judge determined that Dr. Mettu considered "the appropriate objective testing," and unequivocally attributed claimant's disabling respiratory condition to coal dust exposure, and, therefore, he found that Dr. Mettu's opinion was reasoned and documented and sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*.

Employer's argument that Dr. Mettu's opinion is not documented and reasoned is essentially a request for the Board to evaluate the credibility of Dr. Mettu's opinion, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Rinkes v. Consolidation Coal Co.*, 6 BLR 1-826 (1984). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the reviewing authority is required to defer to the administrative law judge's credibility determinations. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). Furthermore, opinions similar to Dr. Mettu's, that claimant's chronic bronchitis is due to a combination of smoking and coal dust exposure, have been found to be reasoned by the Sixth Circuit. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. We, therefore, affirm

the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d).

We also affirm the administrative law judge's finding at 20 C.F.R. §718.204(c), that claimant satisfied his burden to establish disability causation. Contrary to employer's contention, for the reasons discussed *supra*, the administrative law judge acted within his discretion in finding Dr. Mettu's opinion to be reasoned and documented, and also permissibly credited Dr. Mettu's statement that "coal dust exposure significantly aggravated and (or) contributed" to claimant's pulmonary impairment. *See Napier*, 301 F.3d at 712, 22 BLR at 2-551; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; Decision and Order at 29. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c), and the award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge